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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DODSON, JR.,

Defendant and Appellant.

A152553

(Solano County  
Super. Ct. No. VCR219626)

A jury found Anthony Dodson, Jr. guilty of first degree murder and related firearm enhancements. The trial court sentenced him to 50 years to life in prison. On appeal, Dodson challenges the sufficiency of the evidence, the court's instructions to the jury and its responses to jury questions, and certain evidentiary rulings. He also seeks relief under two recent legislative enactments: (1) Senate Bill No. 620 (2017–2018 Reg. Sess. (Senate Bill 620)), which affords trial courts discretion to strike or dismiss certain firearm enhancements (Stats. 2017, ch. 682, §§ 1–2), and (2) Senate Bill No. 1437 (2017–2018 Reg. Sess. (Senate Bill 1437)), which revised the law of felony murder (Stats. 2018, ch. 1015, §§ 2–4).

We reject Dodson's arguments, except we agree (as does the Attorney General) that Dodson is entitled to a remand for the trial court to exercise its discretion under Senate Bill 620 as to whether to strike or dismiss the

firearm enhancements. As to Senate Bill 1437, we conclude that legislation provides no basis for reversal in the present appeal. Dodson must instead seek relief by filing a petition in the trial court under the procedure set forth in Penal Code<sup>1</sup> section 1170.95.

## **I. BACKGROUND**

### ***A. The Charges***

An information charged Dodson with the murder of Frank Gore (§ 187, subd. (a)) and alleged that he personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)).

### ***B. The Evidence Presented at Trial***

On the evening of December 10, 2013, Dodson and Gore both attended a rap music video shoot in Vallejo. As the events of the day wound down, Gore was speaking to two females he knew, M.Z. and A.W., through the open passenger-side window of M.Z.'s car. A.W. was 12 years old. M.Z. and A.W. both testified that they saw Dodson approach Gore with a gun. Dodson and Gore began "tussling," and M.Z. started to drive her car away from the fight.

As they drove away, M.Z. and A.W. heard gunshots. A.W. testified that, when Dodson and Gore were struggling, she saw the gun go "in the air," and she testified that some of the gunshots she heard were fired "in the air." A.W. turned back to see Dodson and another man standing over Gore, "tugging stuff off of him, like they were trying to rob him."

When the police arrived, they found Gore unresponsive with a semi-automatic 9-millimeter gun in his hand. Based on video footage from earlier in the night, it appeared Gore had the gun before the altercation. Gore had

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

sustained nine gunshot wounds, several of which entered his back and rear lower body. The wounds were fatal. A pathologist observed no stippling around the wounds, indicating that the shots were likely fired at Gore from more than 18 inches away, “something like that.” Police found nine .45-caliber bullet casings and two fired copper bullet jackets at the scene. The murder weapon, which was later recovered, was a Ruger .45-caliber handgun.

A month after the incident, the police arrested Dodson.

### ***C. Verdict and Sentencing***

The court instructed the jury on theories of premeditated murder (CALCRIM Nos. 520, 521) and felony murder (CALCRIM Nos. 540A, 540B). In support of the felony-murder theory, the prosecutor argued Gore was killed during the attempted commission of a robbery.

The jury found Dodson guilty of first degree murder and found true all the firearm enhancement allegations. The court sentenced him to 50 years to life in prison, consisting of a term of 25 years to life for the murder conviction and a consecutive term of 25 years to life for the enhancement for personal discharge of a firearm causing great bodily injury or death. The court stayed the other firearm enhancements.

## **II. DISCUSSION**

### ***A. The Court’s Instructions on Felony Murder***

Over Dodson’s objection, the trial court instructed the jury on two theories that could have led to a first degree murder conviction: (1) premeditated murder, i.e., a killing with “malice aforethought” (CALCRIM Nos. 548, 520), elevated to first degree murder by proof that Dodson “acted willfully, deliberately, and with premeditation” (CALCRIM No. 521), and (2) felony murder, i.e., a killing during an attempted robbery (CALCRIM Nos. 548, 540A, 540B). In turn, as to felony murder, the court gave

instructions permitting conviction on either of two theories: Dodson could be found guilty if either he *or* a coparticipant in the underlying felony “caused the death of another person.” (CALCRIM Nos. 540A, 540B.)

Dodson argues the court erred in instructing the jury on both theories of felony murder because there was insufficient factual support for the conclusion that an attempted robbery occurred, which the prosecutor argued was the predicate here for felony murder. The Attorney General responds that there was substantial evidence to support the felony-murder theory that Dodson shot and killed Gore during the attempted commission of a robbery (CALCRIM No. 540A). The Attorney General does not argue there was substantial evidence supporting the alternative felony-murder theory that a coparticipant in the attempted robbery was the shooter (CALCRIM No. 540B). The Attorney General argues, however, that any error in instructing on either or both of the felony-murder theories was harmless because the other theory of first degree murder on which the jury was instructed—a killing with malice and premeditation—was factually supported.

We conclude that, while the evidence of attempted robbery was not overwhelming, there was enough here to warrant the giving of a felony-murder instruction on the theory that Dodson shot and killed Gore during an attempted robbery (CALCRIM No. 540A). We also agree with the Attorney General that any error in instructing on either that theory or the theory that a coparticipant in the attempted robbery shot and killed Gore (CALCRIM No. 540B) was harmless.

“A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the

proper standard of proof. [Citation.] We review the trial court’s decision de novo. In so doing, we must determine whether there was indeed sufficient evidence to support the giving of a [felony-murder] instruction. Stated differently, we must determine whether a reasonable trier of fact could have found beyond a reasonable doubt that defendant committed [first degree] murder based on a [felony-murder] theory.” (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.) Substantial evidence is “evidence which is reasonable, credible, and of solid value.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*).)

“Murder is the unlawful killing of a human being . . . with malice aforethought.” (§ 187, subd. (a).) “All murder that is perpetrated by . . . willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate,” certain specified felonies, including robbery, “is murder of the first degree.” (§ 189, subd. (a).) “[T]he felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant’s mental state’ vis-à-vis an intent to kill. [Citation.] ‘For conviction, the prosecution must establish that the defendant, either before or during the commission of the acts that caused the victim’s death, had the specific intent to commit one of the listed felonies.’” (*People v. Wear* (2020) 44 Cal.App.5th 1007, 1021.)

The prosecutor argued that Gore was killed while Dodson or a co-perpetrator was attempting to rob him. “An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.” (§ 21a.) “Robbery is the felonious taking of personal property in the possession of another, from his

person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) “‘[T]o find a defendant guilty of first degree murder based on a killing perpetrated during a robbery [or attempted robbery], the evidence must show the defendant intended to steal the victim’s property either before or during the fatal assault.’” (*People v. Wear, supra*, 44 Cal.App.5th at p. 1022.)

Because there was sufficient evidence from which a jury could rationally find that Dodson shot and killed Gore during the course of an attempted robbery, we conclude the trial court did not err in instructing the jury on that theory of felony murder (CALCRIM No. 540A). We do not view the evidence of attempted robbery as particularly strong, but it qualifies as reasonable, credible, and of solid value. There was enough for a jury composed of reasonable persons to find that Dodson shot and killed Gore during the course of an attempted robbery.

Gore was wearing jewelry that was visible to others. Dodson must have seen that jewelry as he and Gore had been around each other all day, at all three locations where the video shoot took place—Mare Island, Richardson Park, and finally the Tuolumne recording studio. Surveillance video showed Dodson and others leaving the upstairs recording studio at Tuolumne. Dodson walked into the parking lot. There, a few minutes later, Gore, holding a liquor bottle, was standing at a car talking with M.Z. and A.W. As Gore had his attention on M.Z. and A.W., Dodson approached from behind, pulled out a firearm, and put it to Gore’s neck and head area.

A.W. testified at the preliminary hearing that she saw Dodson shoot Gore. While at trial she testified only that she heard shots, given the jury’s gun-inflicted great bodily injury finding, it seems clear that they accepted the version of her testimony at the preliminary hearing. Moreover, even her trial

testimony that Dodson had a gun in his hand immediately before the shots were fired supports a reasonable inference that Dodson shot Gore. As M.Z. pulled out of the parking lot, A.W., who had been on the floor, returned to her seat, looked back, and saw Dodson and another man standing over Gore. Dodson seemed to be “yanking on” Gore’s jacket. A.W. testified further: “I just remember I looked back and seemed like they were tugging stuff off of him, like they were trying to rob him.” As A.W. further phrased it: “I just thought like what would you do? Why would you be on the floor over somebody tugging on them? Like, are you trying to look through his pockets? Are you trying to tug something off of them?” Reading the record in favor of the judgment of conviction, as we must, and bearing in mind that it does not take much to meet the substantial evidence standard, we conclude the court was justified in giving a felony-murder instruction based on the theory that Dodson shot and killed Gore during an attempted robbery (CALCRIM No. 540A).

Dodson relies principally on *People v. Morris* (1988) 46 Cal.3d 1, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543–544, fn. 5. That case is significantly different from the one before us. *Morris* involved a homicide where the body of the victim, who had been shot to death, was found naked except for shoes and socks in the restroom of a public bathhouse. (*Morris, supra*, at pp. 19–20.) No other clothing or other possessions of any kind were found on or near the body. (*Ibid.*) The only witness merely observed shots being fired, and there was no evidence of motive, other than a vague statement attributed to the defendant that “ ‘he go out there and make money, you know, with these homosexuals, you know, dates—he had to kill one.’ ” (*Id.* at p. 20.) Thus, the basis for a finding of

robbery or attempted robbery in *Morris* was nothing more than speculation. (*Id.* at pp. 20–21.)

We are not in the realm of speculation here. There was property, conduct consistent with a desire to take the property, and witness testimony consistent with an effort to do so. Unless one takes the view that testimony from a child witness is inherently suspect, even if she is competent to testify, there was an evidentiary basis here for a jury to conclude, as A.W. recalled, Dodson and his co-perpetrators tried to “tug[] stuff off of [Gore], like they were trying to rob him” as he lay wounded. The jury heard A.W.’s testimony; observed her demeanor; and had before it arguments from the defense about contradictions that were elicited on cross-examination. In giving a felony-murder instruction the court was obligated to view A.W.’s testimony as having the same value as testimony from any other competent witness—that is, whatever weight the jury might decide to give it.

Dodson contends the court’s error in instructing on felony murder based upon attempted robbery is illustrated by the court’s reasoning process. Pointing to comments by the court suggesting that it found that the lack of evidence of some other motive for the shooting in and of itself supplied the evidence that the motive was robbery, Dodson argues that the court’s own words show that it erroneously relied on speculation to instruct on attempted robbery felony murder. But the court’s reasoning process is irrelevant. Trial courts can be right for the wrong reasons. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.) The bottom line is that it would not require speculation for a jury to find Dodson shot and killed Gore during the course of an attempted

robbery. That conclusion is not mandated by the evidence, but it is one reasonable inference that the jury could rationally draw.<sup>2</sup>

The Attorney General argues that the felony-murder instructions, if erroneous, were harmless because there existed a factually supported theory of first degree murder that the jury could use to convict. We agree with that argument as well. In reviewing an erroneous jury instruction for prejudice, we differentiate between legally inadequate instructions, which misstate the law, from factually inadequate instructions. The California Supreme Court in *Guiron* harmonized the rulings of *Griffin v. United States* (1991) 502 U.S. 46 (*Griffin*) and *People v. Green* (1980) 27 Cal.3d 1, applying the *Griffin* rule to factually inadequate instructions and the *Green* rule to legally inadequate instructions. (*Guiron*, *supra*, 4 Cal.4th at pp. 1126–1129.) “If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.” (*Id.* at p. 1129.) “But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute” (*ibid.*), then the “‘beyond a reasonable doubt’

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<sup>2</sup> Dodson asserts that, “[w]hen the facts give equal support to two competing inferences, neither is established.” (Citing *People v. Acevedo* (2003) 105 Cal.App.4th 195, 198.) *Acevedo* does not provide a basis for reversal here. As the court explained in *People v. Massie* (2006) 142 Cal.App.4th 365: “*Acevedo* . . . involved speculation and correctly concluded that such speculation did not support the conviction[] in [that case]. [It] cannot be read to stand for the proposition that a conviction must be reversed when reasonable but conflicting inferences could have been drawn by the trier of fact. Such a standard of review would be contrary to California Supreme Court precedent.” (*Id.* at p. 369.) “It is the province of the trier of fact to decide whether an inference should be drawn and the weight to be accorded the inference.” (*Id.* at p. 374.)

standard of review established in *Chapman v. California* (1967) 386 U.S. 18, 24 . . . for federal constitutional error applies.” (*People v. Aledamat* (2019) 8 Cal.5th 1, 3; *id.* at pp. 9, 13.)

Though Dodson superficially claims in his opening brief that the jury instructions here were legally insufficient, he makes no concrete argument that the trial court’s definition of the felony-murder rule differed from the law at the time of trial.<sup>3</sup> Substantively, Dodson argues that the facts did not adequately support the felony-murder instructions. Thus, we apply *Griffin*. Generally, “[t]he jurors’ ‘own intelligence and expertise will save them from’ the error of giving them ‘the option of relying upon a factually inadequate theory.’” (*Guiron*, *supra*, 4 Cal.4th at p. 1131.) But it is important to note that the *Guiron* court explicitly did not “hold that affirmance is always appropriate under *Griffin*.” (*Id.* at p. 1129.) To apply the test, we first check whether there is another factually supported theory which the jury could have relied upon and then assess whether the record “affirmatively demonstrates a reasonable probability that the jury . . . found the defendant guilty solely on the unsupported theory.” (*Id.* at p. 1130.)

The Attorney General points to the theory of a killing with malice and premeditation as a properly supported theory of first degree murder that the jury could have relied on. As noted, an unlawful killing of a human being with malice aforethought is murder. (§ 187, subd. (a).) “[M]alice may be express or implied.” (§ 188, subd. (a).) “Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow

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<sup>3</sup> As we discuss in part II.H, *post*, legislative revisions to the law of felony murder that occurred *after* Dodson’s conviction and sentence (via Senate Bill 1437, effective January 1, 2019) do not provide a basis for reversal in the present appeal. Instead, Dodson must seek relief in the trial court.

creature.” (*Id.*, subd. (a)(1).) “Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (*Id.*, subd. (a)(2).) And as also noted above, “[a]ll murder that is perpetrated by . . . willful, deliberate, and premeditated killing . . . is murder of the first degree.” (§ 189, subd. (a).)

As we discuss in part II.B, *post*, we agree with the Attorney General that the facts of this case adequately support a jury’s finding of first degree murder based on a theory of premeditation. And we find no “affirmative indication in the record” that the jury’s first degree murder verdict “actually did rest on the [allegedly] inadequate ground” of felony murder. (*Guiton*, *supra*, 4 Cal.4th at p. 1129.) The jurors returned a general verdict of first degree murder, with no indication they relied on a felony-murder theory to reach that result. Indeed, as to one of the two felony-murder theories—the theory that someone other than Dodson shot Gore during an attempted robbery (CALCRIM No. 540B)—the verdict contains an affirmative indication that the jury did *not* adopt this theory. The jury found true the enhancement allegation that Dodson *personally discharged* a firearm causing Gore’s death, a finding that (as discussed in part II.C, *post*) is supported by substantial evidence.

Moving beyond the verdict itself, the record provides no affirmative indication that the jury based its finding of first degree murder on either of the felony-murder theories. In closing argument, the prosecutor stressed the theory that Dodson committed a willful, deliberate, and premeditated first degree murder (CALCRIM No. 521), although he also did discuss the felony-murder theory that Dodson shot and killed Gore during an attempted robbery (CALCRIM No. 540A). During deliberations, the jurors asked no questions about felony murder that would indicate they were focused particularly on

that theory. (Cf. *Guiton*, *supra*, 4 Cal.4th at p. 1129 [“We may, for example, hypothesize a case in which the district attorney stressed only the invalid ground in the jury argument, and the jury asked the court questions during deliberations directed solely to the invalid ground. In that case, we might well find prejudice. The prejudice would not be assumed, but affirmatively demonstrated.”].)

For the foregoing reasons, Dodson has not shown that the record “affirmatively demonstrates a reasonable probability that the jury . . . found the defendant guilty solely on the [allegedly] unsupported theory” of felony murder. (*Guiton*, *supra*, 4 Cal.4th at p. 1130.) He notes that (as we discuss in part II.D, *post*) the jury asked questions during deliberations about the concepts of express and implied malice. But in our view, these questions, if anything, suggest the jury was focused primarily on the malice-premeditation theory of first degree murder, rather than on the felony-murder theories.

Finally, Dodson notes differences between felony murder and premeditated murder as reflected in the court’s instructions, pointing out that, if the jurors adopted one of the felony-murder theories, then (1) Dodson would be guilty of *first degree* murder without a need to prove premeditation, and (2) the defense of self-defense would not apply. (See § 189, subd. (a); CALCRIM Nos. 505, 540A, 540B, 548.) But these doctrinal differences between the theories of murder do not provide any affirmative indication that the jury actually *did* rely on a theory of felony murder in reaching its verdict. Dodson has not shown prejudice.

### ***B. Sufficiency of the Evidence of Premeditation and Deliberation***

Dodson contends there was insufficient evidence to support a finding he acted with premeditation and deliberation and thus was guilty of first degree murder. We disagree. “In reviewing a challenge to the sufficiency of the evidence under the due process clause of the Fourteenth Amendment to the

United States Constitution and/or the due process clause of article I, section 15 of the California Constitution, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.” (*People v. Cole, supra*, 33 Cal.4th at p. 1212.)

“A murder that is premeditated and deliberate is murder of the first degree. (§ 189.) ‘In this context, “premeditated” means “considered beforehand,” and “deliberate” means “formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.”’ [Citation.] ‘An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.’ ” (*People v. Jurado* (2006) 38 Cal.4th 72, 118.) “‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.” ’ ” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) “A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but ‘[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.’ ” (*Jurado, supra*, at pp. 118–119.)

Here, all three types of evidence were present. There was evidence supporting an inference that Dodson planned his attack on Gore. Dodson came down the stairs at the Tuolomne location, walked into the parking lot,

and within moments approached Gore from behind and pulled out a gun, holding it to Gore's head or neck area. Gore no longer had his male friends with him at that point. When Dodson approached him, Gore was at the passenger-side window of a car. The jury reasonably could have viewed Dodson's actions, including his sudden use of a concealed weapon to attack an unsuspecting victim, as demonstrating planning and premeditation.

As to motive, we have concluded in part II.A, *ante*, that there was evidence Dodson intended to rob Gore, providing him a motive to kill and bolstering the inference that he engaged in a planned attack on Gore. Contrary to Dodson's argument, this was a reasonable inference from the evidence and not one that required improper speculation.

Dodson notes the evidence did not compel the conclusion that he planned to kill Gore. Dodson argues that, "[i]f a surprise killing was planned the shots would have been fired before a struggle commenced." But the jury reasonably could have reached a contrary conclusion. Dodson's decision to approach Gore and place a gun to his head or neck, rather than simply shooting him from a distance, was still consistent with a plan to kill and rob him. The jury was entitled to conclude, for example, that Dodson sought to kill only after instilling maximum fear in his victim.

The manner of killing also supports an inference of premeditation and deliberation. The pathologist who conducted the autopsy testified Gore was shot nine times, with several bullets entering his back and rear lower body. If the jury believed that Dodson fired the murder weapon—which is a reasonable inference given the evidence, and from the enhancement finding—then the evidence of Gore's injuries implies that Dodson shot Gore several times when he was already down. This suggests a premeditated and deliberate intent to kill.

Dodson argues the multiple gunshots fired into Gore's back "indicate violence, but do not in and of themselves evince premeditation and deliberation." We disagree. A reasonable jury could find this manner of killing, when coupled with the evidence of planning and motive, provided evidence of an intentional killing carried out according to a preconceived design.

Finally, Dodson argues that the video surveillance footage of the shooting establishes that he did not fire the fatal shots. Specifically, Dodson contends the surveillance footage shows muzzle flashes circling Dodson and Gore as they fought, thus indicating that a third person was the shooter. Nothing about the surveillance footage is clear. The images are so grainy and indistinct that it is difficult to make out anything more than some movements and some light flashes in the general area of the fight. We see nothing at all to compel a conclusion that someone other than Dodson shot Gore, or that shows whether the fatal shots were fired at close range or from a distance. The video evidence did not preclude the jury from reasonably concluding that Dodson shot Gore and acted with premeditation and deliberation.

***C. Sufficiency of the Evidence That Dodson Personally Discharged a Firearm and Proximately Caused Great Bodily Injury or Death***

Dodson also contends there was insufficient evidence to support the jury's finding that he personally and intentionally discharged a firearm and proximately caused great bodily injury or death (§ 12022.53, subd. (d)), a finding that provided the basis for a consecutive sentence of 25 years to life. Viewing the record in the light most favorable to the judgment, there is substantial evidence supporting the jury's finding on this point.

A.W. and M.Z. both testified Dodson was holding a gun as he approached Gore. Dodson and Gore then struggled, and within seconds after

that A.W. and M.Z. heard shots. Gore was shot nine times and died from his wounds. A.W. testified at the preliminary hearing that she saw Dodson shoot Gore.

The jury reasonably could infer from this evidence that Dodson fatally shot Gore with the Ruger .45-caliber handgun that was later determined to be the murder weapon. Alleged inconsistencies or weaknesses in the witnesses' testimony—such as A.W.'s description of the gun held by Dodson as a “little pistol[],” her testimony that she heard shots fired “in the air,” and limitations on what she and M.Z. could see as they drove away in an effort to avoid being shot—did not preclude the jury from reasonably drawing this inference. The jury could assess the weight and persuasiveness of the witnesses' testimony in light of these alleged weaknesses.

Dodson again argues the surveillance footage shows that the shots causing Gore's death came from a distance while he and Gore were engaged in hand-to-hand combat. As discussed above, the video footage does not clearly show where the shots came from. It did not preclude the jury from reasonably inferring, based on the witness testimony and other evidence, that Dodson shot and killed Gore.

#### ***D. The Trial Court's Responses to the Jury's Questions About Express and Implied Malice***

Dodson contends the court failed to respond adequately to questions from the deliberating jury about the concepts of express and implied malice. We disagree.

“Under Penal Code ‘section 1138 the court must attempt “to clear up any instructional confusion expressed by the jury.” [Citation.]’ [Citation.] ‘This means the trial “court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the

original instructions are themselves full and complete, the *court has discretion* under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information. . . .” [Citation.]’ [Citations.] Penal Code section 1138 does not demand elaboration upon the standard instructions by the trial court when the jury expresses confusion, but rather directs the court to ‘consider how it can best aid the jury and decide whether further explanation is desirable, or whether the reiteration of previously given instructions will suffice.’” (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 316–317.)

The court instructed the jury that Dodson had been prosecuted for murder under theories of malice aforethought and felony murder. (CALCRIM No. 548.) The court instructed on the malice theory using CALCRIM No. 520, which lists three elements of the crime: “1. The defendant committed an act that caused the death of another person; AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. AND [¶] 3. He killed without lawful excuse or justification.” The instruction explained that “malice aforethought” (the second element of murder) can be established by proof of either “express malice” or “implied malice,” defined as follows: “The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; AND [¶] 4. He deliberately acted with conscious disregard for human life.”

During deliberations, the jury asked three questions—Request Nos. 6, 7 and 8—about express and implied malice. In Request No. 6, submitted on November 15, 2016, the jury asked for “legal clarification regarding express

malice and implied malice” and for the “judge to talk to us.” After discussing the request with counsel, the court provided a written response directing the jury to review CALCRIM No. 520 and reiterating the portion of that instruction defining express malice and implied malice.

The following morning, November 16, 2016, the jury submitted Request No. 7, which stated: “Please provide clarification [¶] murder 1 [unknown] 3 He killed . . . requires defendant to be shooter—correct? [¶] Under implied malice #3 He acted . . . does this require the defendant to be the shooter?” The court and counsel discussed the request, which they agreed was difficult to understand but appeared to ask which theory or theories of murder required proof that Dodson was “the shooter.” The court provided a written response noting that the jury had been presented with two theories of murder: (1) murder with malice aforethought, and (2) felony murder, i.e., murder during an attempted robbery. As to felony murder, the court stated (consistent with its instructions on that theory, CALCRIM Nos. 540A and 540B) that the jury did not need to find Dodson was “the person who discharged a firearm,” but could instead find him guilty of murder if “he aided and abetted the commission of the attempted robbery that resulted in the shooting and death.”

Turning to the theory of murder with malice aforethought, the court in its response did not specify whether the jury had to find Dodson was the shooter to convict on that theory (a point on which counsel had disagreed in their colloquy with the court about Request No. 7). Instead, the court referred the jury to its earlier instructions. The court stated that, “[u]nder a theory of murder with malice aforethought (either express or implied), the definitions and elements are contained in instruction [CALCRIM No.] 520.”

The court then restated most of the text of CALCRIM No. 520, listing the three elements of murder and the definitions of express and implied malice.

Finally, later the same day (November 16, 2016), the jury submitted Request No. 8, which stated: “The instructions on ‘express’ or ‘implied’ use the language: [¶] Express—‘He killed without lawful excuse’ [¶] Implied—‘He ACTED . . .’ [¶] Does this imply that to qualify as ‘Implied’ the defendant didn’t need to be ‘the shooter’?” During a colloquy between the court and counsel about this request, defense counsel stated it appeared the jury had a misunderstanding of the meaning of express malice. Counsel stated: “I thought the Court should point them to the fact that he killed without lawful excuse or justification is, in fact, the third element of murder, which is required for any finding of murder, express or implied, and to what the actual definition of express malice is.” Counsel asked the court to send a response stating it appeared the jury misunderstood express malice and providing the definition of that term (i.e., the defendant unlawfully intended to kill).

The court declined to instruct the jury further, noting it had already reiterated the definitions of express and implied malice twice, and stating it did not want to create more confusion, especially since it was not entirely clear what the jury was asking. The court stated: “I think at this point all we can do is steer them back to the instructions and hope because any comment on their question it’s like commenting on the deliberation and that’s possibly create more harm and based on an assumption that maybe we have a problem here maybe we don’t. I’m not quite sure what to make of some of these questions.” The court continued: “At this point, . . . the questions are coming quicker, they seem to be now a trend, addressing these particular elements. So, let’s see what they say. Let’s see if we get another question that reveals either further misunderstanding or focuses maybe in more detail

on a specific issue. [¶] So, I don't see any good coming from me sending anything further back. I'm not going to do anything. We'll let them continue to deliberate and see what we see." The jury returned its verdict two days later, on November 18, 2016.

Dodson argues the court responded inadequately to the jury's questions about express and implied malice. He asserts the court erred by providing the jury with a restatement of CALCRIM No. 520 (specifying the elements of murder and the definitions of express and implied malice) "outside the context of the full instruction set" on such matters as self-defense, imperfect self-defense, and heat of passion (CALCRIM Nos. 505, 570, 571). He also states the court should have instructed as to "what was meant by 'without lawful excuse or justification,' " a phrase used in CALCRIM No. 520.

We find no abuse of discretion. The jury's questions appeared to be focused primarily on the concepts of express and implied malice. It was reasonable for the court to respond by referring the jury to CALCRIM No. 520, the instruction that explains the meaning of those terms. The jurors did not ask the court to explain the meaning of the phrase "without lawful excuse or justification" and did not even refer to that language in the first two of the questions at issue (Request Nos. 6 and 7). Request No. 8, which did refer to the language " 'without lawful excuse,' " still appeared to be focused primarily on the question of whether an implied malice theory required proof that Dodson was " 'the shooter.' " No party asked the court to respond to the requests with a fuller set of the original instructions, as Dodson now suggests should have occurred.

What Dodson's trial counsel did ask was that the court provide further instruction directed to matters covered by CALCRIM No. 520 itself, including (1) telling the jurors that it appeared they might have misunderstood the

definition of express malice, (2) repeating that killing without lawful excuse or justification is the third element of murder, and (3) reiterating the definition of express malice. It was reasonable for the court to decline this request out of concern that a “comment” on the jury’s questions would be “like commenting on the deliberation” and might create confusion or uncertainty where none existed. The court’s decision not to expand on its two prior answers to the jury’s malice questions with a potentially misleading response was not an abuse of discretion.

Since we conclude the court did not abuse its discretion under section 1138 in responding to the jury’s questions, we need not address the parties’ arguments as to whether the purported error was prejudicial.<sup>4</sup>

***E. The Exclusion of Evidence of Frank Gore’s Intoxication and Related Expert Testimony***

Dodson argues the trial court erred by excluding evidence that Gore had cocaine and Xanax in his system at the time of his death, along with proffered expert testimony about the potential effect of those drugs when combined with alcohol. The Attorney General contends Dodson forfeited this argument by failing to obtain from the trial court a final ruling on the issue. The Attorney General does not address the propriety of excluding the evidence. We conclude that, assuming the court made a sufficiently final ruling, there was no error.

At several points in the trial court proceedings, including during in limine discussions and later at an Evidence Code section 402 hearing (section

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<sup>4</sup> In a supplemental brief, Dodson argues Senate Bill 1437, which revised the law of murder and took effect on January 1, 2019, “impacts the standard of prejudice” applicable to the court’s claimed error in reinstructing the jury in response to its questions about malice. As noted, we find no error, so we do not address any question as to the applicable standard of prejudice.

402 hearing), Dodson sought to introduce evidence that Gore, in addition to having a blood-alcohol level of 0.12 percent at the time of his death, also had 0.24 milligrams per liter of cocaine (not a high dose) and 0.02 milligrams per liter of alprazolam (also known as Xanax) in his system. Dodson also proffered expert testimony from pharmacologist Gantt Galloway about the potential combined effects of these three drugs. Galloway testified at the section 402 hearing: “Those effects can vary, but what I would be concerned about . . . is that somebody feels more impulsive and less inhibited with the [a]lprazolam and the alcohol they don’t have good brakes on their behavior and cocaine tends to be activating and makes one sort of quicker on the trigger, so to speak, more prone to the fight or flight state of mind.”<sup>5</sup>

Dodson’s trial counsel argued this evidence was relevant to support the defense theory that, when Dodson approached, Gore responded in a “hypervigilant” manner and pulled a gun, requiring Dodson to act in self-defense by struggling with Gore. The court admitted the evidence of Gore’s blood-alcohol level (as there was video evidence showing Gore had a bottle of vodka in his hand), but the court was not persuaded there was a basis to admit the evidence that Gore had cocaine and Xanax in his system or the expert testimony about the potential combined effects of the three drugs. Specifically, the court stated there needed to be some evidence that Gore in fact acted in a hypervigilant manner as a prerequisite to admitting the proffered toxicology information and expert testimony to corroborate or explain that evidence. The court also expressed concern about the prejudicial impact of admitting evidence of drug use by Gore, an African-American man.

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<sup>5</sup> Gore had a prescription for Xanax. Galloway testified that the instructions for such a prescription would be to not consume alcohol with it.

As the Attorney General points out, the trial court did not definitively rule that the evidence of Gore’s substance use and the related expert testimony were inadmissible. At the mid-trial section 402 hearing (the last time the court and counsel discussed this issue), the court continued to qualify its ruling that there was not yet a proper basis for admitting the proffered evidence, stating: “Anyway, we can revisit this later. [I’m] not ruling it out. I don’t think you’re there yet.” The court reiterated: “I need to hear the rest of your evidence.” We do not address the parties’ dispute in their appellate briefs as to whether Dodson forfeited this issue by failing to obtain a sufficiently final ruling on the matter from the trial court. Instead, assuming Dodson did not forfeit the issue, we find no error.

“We review for abuse of discretion a trial court’s rulings on the admissibility of evidence.” (*People v. Benavides* (2005) 35 Cal.4th 69, 90.) Only relevant evidence is admissible. (Evid. Code, § 350.) Moreover, Evidence Code section 352 grants a trial court discretion to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” As Dodson notes, our Supreme Court has stated that “Evidence Code section 352 must yield to a defendant’s due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) But even bearing in mind this limitation on the scope of a trial court’s discretion, we find no error here.

The court reasonably concluded that the proffered evidence—evidence of Gore’s intoxication and expert testimony that the drugs at issue *could* combine to make a person hypervigilant—did not have significant probative value in the absence of evidence that Gore in fact responded to Dodson’s

approach in a hypervigilant manner. Dodson did not testify, and no witness testified to a version of events that would support a conclusion that Gore reacted to Dodson's approach in an inexplicably volatile or irrational manner. A.W. and M.Z. testified that Gore was speaking to them through M.Z.'s open car window when Dodson approached from behind with a gun, and M.Z. testified that Dodson then put the gun to Gore's neck and head area.

There is no evidence that Gore saw, spoke to, or made any gestures toward Dodson in the moments before Dodson suddenly set upon him with a gun. That Gore responded to such an aggressive and startling action by asking, " 'Nigga what you doing?' " and struggling with Dodson does not suggest Gore was hypervigilant. It suggests nothing more than understandable surprise and a feckless attempt at self-protection. Nor does Gore's behavior toward others before Dodson's sudden attack suggest a heightened threat-sensitivity. Prior to the fateful encounter with Dodson, Gore lifted up his shirt or jacket and apparently flashed a firearm at another man, who then ran off, but it is a stretch to say that that evidenced an inclination toward overreaction or hypervigilance when Dodson jumped him with a gun from behind.

Dodson relies principally on *People v. Wright* (1985) 39 Cal.3d 576 (*Wright*), but that case is distinguishable. In *Wright*, a homicide case, the Supreme Court found error (although harmless) where the trial court excluded evidence the victim had heroin in his system within 24 hours of his death. (*Id.* at pp. 582–586.) The defendant in *Wright* testified the victim threatened him, was acting irrationally, and might have been under the influence of some drug. (*Id.* at pp. 581–582.) The defense theory was that the defendant shot the victim in self-defense in response to the victim's irrational behavior. (*Id.* at p. 583.) The excluded evidence of the victim's

drug use would have supported the defendant's perception of the victim's irrational state of mind. (*Ibid.*) The excluded evidence also would have impeached the credibility of the prosecution's primary witness, the victim's wife, who had testified that the victim had not used narcotics in the 24 hours prior to his death. (*Id.* at p. 584.)

Here, there was no similar basis for finding the proffered drug evidence had significant probative value. As noted, there was no evidence that Gore responded irrationally to Dodson's approach and no evidence as to how Dodson perceived Gore's response. While the excluded evidence in *Wright* could have corroborated a version of events that had a basis in the evidence (see *Wright, supra*, 39 Cal.3d at p. 583), here there was no anchoring evidence for Dodson's hypervigilance theory. Contrary to his suggestion, *Wright* does not hold that trial courts must admit evidence of a victim's drug use to support a defendant's hypothesized version of events that has no independent evidentiary foundation. The other basis for the Supreme Court's finding of relevance in *Wright* is absent here as well: Since no one testified that Gore's body was drug-free, or that he was perfectly sober on the night of the shooting, evidence he had drugs in his system had no impeachment value (see *id.* at p. 584).

It may have been within the trial court's discretion to admit all proffered evidence of Gore's intoxication, but we cannot say the opposite is true, especially when the court struck a middle ground and admitted some of the evidence. Typical of the balance that must always be struck with rulings under Evidence Code section 352, the court took the view that the prejudice side of the equation called for a line to be drawn short of where Dodson wished to see it. In doing so, the court here gave more weight to prejudice than the court did in *Wright*, which had before it a situation in which there

already was evidence of the victim's heroin use, including recent use, in the record. (*Wright, supra*, 39 Cal.3d at pp. 581, 584.) In light of that evidence, the *Wright* court concluded it was unlikely that the additional evidence (showing heroin in the victim's system within 24 hours of his death) would have further prejudiced the jury against the victim or the prosecution. (*Id.* at p. 585.) Here, in contrast, while there was evidence that Gore consumed alcohol, there was no other evidence of his use of cocaine or Xanax. Wholly aside from the trial court's comment about racial stereotyping (a comment with which we do not disagree), it is indisputable that drug use has the potential to reflect poorly on any person's character. The court did not abuse its discretion in declining to admit the evidence proffered by Dodson.

***F. The Exclusion of a Portion of A.W.'s Preliminary Hearing Testimony***

Dodson contends the court erred by excluding a portion of A.W.'s preliminary hearing testimony in which she allegedly described Frank Gore's handling of a gun during his struggle with Dodson. We disagree.

At trial, A.W. testified that on the night of the incident she did not see Frank Gore handling his own gun:

“Q. At any point there on that night in the parking lot there did you ever see Frank pull out his own gun?

“A. I don't remember.

“Q. Okay. Did you—was that something that you would have remembered actually seeing Frank pull out his own gun?

“A. No, I don't believe he pulled out a gun.”

During re-cross-examination, defense counsel and A.W. had this exchange:

“Q. Okay. At the preliminary hearing you said when they were struggling for the gun, when you were talking about them struggling for the gun?

“A. Uh-huh.

“Q. That Frank was holding the part to pull the trigger?

“[The Prosecutor]: I’m going to object as to what he’s saying she’s saying.

“THE COURT: The form of the question. Ask her if she said something. Go ahead and ask that.

“[Defense Counsel]: Q. Did you say that during—did you tell Frank was holding the part to pull the trigger then Frank took the part sticking out and pointed it up?

“A. No.”

Defense counsel later sought to introduce preliminary hearing testimony from A.W. in which she allegedly described Gore’s hands on a gun during the struggle that preceded the shooting. The preliminary hearing testimony (which defense counsel read into the trial record when discussing its admissibility with the court) was as follows:

“Q. Did you see Frank do something?

“A. Yeah. He hurried up. And, like, he was holding part of the—to pull the trigger. And the guy—and then Frank took the part that was sticking out and pointed it up.”

The court asked counsel, “Are you trying to suggest that she’s saying that Frank had his hand on the trigger?” Counsel responded: “I asked her about it and she said no, Frank was never holding the part to pull the trigger.” The court stated: “No, that’s not what she said there. No one

clarified that, but that statement is almost incomprehensible. But no, we're not going to include that one."

Dodson argues the court should have admitted the preliminary hearing testimony as a prior inconsistent statement under Evidence Code section 1235. "[T]he trial court has discretion to exclude impeachment evidence, including a prior inconsistent statement, if it is collateral, cumulative, confusing, or misleading." (*People v. Price* (1991) 1 Cal.4th 324, 412.) Here, the court, characterizing the proffered statement as "almost incomprehensible," evidently concluded it was too confusing to be clearly inconsistent with A.W.'s trial testimony. The court's conclusion was reasonable and was not an abuse of discretion. The proffered portion of A.W.'s preliminary hearing testimony—"Yeah. He hurried up. And, like, he was holding part of the—to pull the trigger. And the guy—and then Frank took the part that was sticking out and pointed it up"—is not a clear statement that Gore had his hand on the trigger of a gun, either his own or Dodson's.

Dodson acknowledges it is "unclear" from A.W.'s testimony "whether [she] was referring to a gun in Gore's possession, a gun held by the shooter, or both in the cited passage." But he argues vagueness was not a reason to exclude the statement because "that vagueness speaks volumes." In our view, the trial court reasonably could reach a different conclusion and determine the statement at issue was difficult to understand and thus was not clearly inconsistent with A.W.'s trial testimony.

We also are not persuaded the court's ruling violated Dodson's constitutional right to present a defense. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.'" (*People v. Fudge* (1994)

7 Cal.4th 1075, 1102–1103.) The court’s exclusion here of a single question-and-answer exchange from the preliminary hearing did not violate Dodson’s constitutional rights.

***G. Remand for the Trial Court To Exercise its Discretion To Strike the Firearm Enhancements***

As noted, the jury found Dodson guilty of first degree murder (§ 187, subd. (a)) and found true that during the commission of the crime he personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)).

At sentencing in August 2017, the court recognized it had no discretion but to impose the sentence it did: 25 years to life for the murder conviction, plus a consecutive term of 25 years to life for the enhancement finding that Dodson personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)). The court stayed the sentences for the other firearm enhancements (§§ 12022.5, subd. (a), 12022.53, subds. (b)–(c)) pursuant to section 654. (See § 12022.53, subd. (f).)

Senate Bill 620, which took effect on January 1, 2018, amended sections 12022.5 and 12022.53 to give trial courts discretion to strike or dismiss the above firearm enhancements in the interest of justice. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) The parties agree that these amendments apply retroactively to cases not yet final on appeal and that we should remand to the trial court to exercise its discretion in deciding whether to strike or dismiss the firearm enhancements. We agree. (E.g., *People v. Phung* (2018) 25 Cal.App.5th 741, 762–763; *People v. Vela* (2018) 21 Cal.App.5th 1099, 1113–1114.)

## **H. *Senate Bill 1437***

In a supplemental brief, Dodson argues Senate Bill 1437, which revised the law of murder and took effect January 1, 2019, applies retroactively and provides a basis for relief in this appeal. Specifically, Dodson contends one of the theories that was submitted to the jury to support a first degree murder conviction—robbery felony murder based on aiding and abetting (CALCRIM No. 540B)—is now a legally invalid theory under the law as revised by Senate Bill 1437. He also asserts the changes made by Senate Bill 1437 alter the standard of prejudice applicable to the trial court’s alleged error in responding to the jury’s questions during deliberations.

We conclude Dodson is not entitled to the ameliorative benefits of Senate Bill 1437 on appeal. Although the Legislature intended Senate Bill 1437 to have retroactive effect, it established a resentencing petition procedure under section 1170.95 for that purpose. We will affirm Dodson’s conviction, while leaving him free to seek relief in the trial court under section 1170.95.

“Senate Bill 1437 was enacted to ‘amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.’ (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability. Senate Bill 1437 also adds . . . section 1170.95, which allows those ‘convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be

resentenced on any remaining counts . . . .’ (§ 1170.95, subd. (a).)” (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).)

The sentencing recall and resentencing procedure set forth in section 1170.95 is available to offenders whose sentences are final, as well as those, like Dodson, whose sentences are not yet final. (*Martinez, supra*, 31 Cal.App.5th at p. 727.) Section 1170.95 describes the procedure in detail, providing in part that a petitioning offender must first make out a prima facie case demonstrating eligibility for relief (§ 1170.95, subds. (a)(1)–(3), (b)(1)(A), (c)); the trial court must then hold a hearing to determine whether to vacate the murder conviction and recall the sentence, unless the parties agree the petitioner is eligible for relief (*id.*, subd. (d)(1)–(2)); both parties may rely on the record of conviction or offer new or additional evidence (*id.*, subd. (d)(3)); and the prosecution bears the burden to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing (*ibid.*). (See *Martinez, supra*, at pp. 723–724.)

These provisions make clear that Senate Bill 1437 is retroactive. And for offenders whose convictions are final, having exhausted the appellate process, section 1170.95 provides the mechanism to argue for application of the ameliorative provisions of Senate Bill 1437. Dodson argues, however, that because his conviction is not yet final, he may seek more immediate relief by asking this court to apply the revised law of felony murder as a basis for reversal in his pending appeal. We disagree and will instead adopt the approach taken in *Martinez*, where the Court of Appeal held that, for both final and nonfinal cases, the exclusive mechanism for retroactive application of Senate Bill 1437 is the petition procedure in section 1170.95. (*Martinez, supra*, 31 Cal.App.5th at pp. 727–728.)

Citing cases construing and applying analogous ameliorative statutes enacted by Proposition 36 (*People v. Conley* (2016) 63 Cal.4th 646 (*Conley*)) and Proposition 47 (*People v. DeHoyos* (2018) 4 Cal.5th 594 (*DeHoyos*)), the *Martinez* court held that “[t]he analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable here. Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal.” (*Martinez, supra*, 31 Cal.App.5th at p. 727.) The holding and the analysis in *Martinez* have been adopted by other Court of Appeal panels in published opinions. (E.g., *People v. Cervantes* (2020) 46 Cal.App.5th 213, 220, 222–223; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147, 1153.)

We also find the analysis in *Martinez* persuasive and will adopt it. To the extent Dodson is eligible for relief under Senate Bill 1437, he must seek it by filing a section 1170.95 petition in the trial court. Like the defendant in *Martinez*, Dodson “resists this conclusion, arguing *Conley* and *DeHoyos* are distinguishable because the petitioning procedures enacted by Propositions 36 and 47 conditioned sentencing relief on a trial court finding that the defendant would not pose an unreasonable risk of danger if released, and

section 1170.95 contains no such requirement.” (*Martinez, supra*, 31 Cal.App.5th at p. 728.) As the *Martinez* court explained, “[w]hile defendant is correct that section 1170.95 does not require a dangerousness inquiry, neither *Conley* nor *DeHoyos* holds that inquiry was the indispensable statutory feature on which the result in those cases turned. To the contrary, *Conley* notes ‘[o]ur cases do not “dictate to legislative drafters the forms in which laws must be written” to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require “that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.” ’ ” (*Martinez, supra*, at p. 728, quoting *Conley, supra*, 63 Cal.4th at pp. 656–657.) In our view, the Legislature provided that degree of clarity by establishing a detailed mechanism for applying Senate Bill 1437 retroactively via section 1170.95 without drawing any distinction between final and nonfinal cases.

Also like the defendant in *Martinez*, Dodson contends “his right to seek reversal of his conviction on direct appeal is supported by other cases in which the defendants were allowed to argue” a nonfinal conviction must be reversed “due to a legislative change in the elements of a criminal offense.” (*Martinez, supra*, 31 Cal.App.5th at p. 728.) We agree with the *Martinez* court’s rejection of this argument as well. The cases Dodson cites on this point—*People v. Ramos* (2016) 244 Cal.App.4th 99 and *People v. Eagle* (2016) 246 Cal.App.4th 275—“involved changes to the substantive elements of the defendants’ crimes before their sentences were final,” but neither case “involved a new or amended law that ‘modif[ied], limit[ed], or entirely forb[ade] the retroactive application of ameliorative criminal law amendments.’ ” (*Martinez, supra*, at pp. 728–729, quoting *Conley, supra*, 63 Cal.4th at p. 656.) They are thus inapposite here.

Dodson also contends section 1170.95, subdivision (f) supports his argument for direct appeal retroactivity because it states: “This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.” The same argument was presented in *Martinez*, and we agree with the analysis of the Court of Appeal there: “The court in *Conley* rejected a similar argument concerning an analogous provision included in the text of Proposition 36, reasoning that provision ‘contain[ed] no indication that automatic resentencing—as opposed to, for example, habeas corpus relief—ranks among the “rights” the electorate sought to preserve.’ (*Conley, supra*, 63 Cal.4th at p. 661.) We reach the same conclusion here, where there is no indication that reversal of a defendant’s sentence on direct appeal without compliance with the procedures outlined in section 1170.95 was among the ‘rights’ the Legislature sought to preserve in enacting Senate Bill 1437.” (*Martinez, supra*, 31 Cal.App.5th at p. 729.)

Finally, Dodson asserts that requiring a defendant whose case is pending on appeal to present his or her Senate Bill 1437 claim in the trial court “leaves the defendant without a remedy” because the trial court would not have jurisdiction over such a claim until the appeal is resolved and the remittitur issues. (See *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 924–930 [trial court had no jurisdiction to hear a Proposition 47 petition while appeal was pending].) We reject this argument. Nothing in the section 1170.95 petition procedure enacted by Senate Bill 1437 suggests the Legislature intended to confer on convicted defendants an entitlement to immediate retroactive relief. (*People v. Anthony, supra*, 32 Cal.App.5th at p. 1156; see *Scarbrough, supra*, at p. 928 [reaching same conclusion as to Proposition 47].) It is reasonable for the Legislature to have designed a statutory process where the trial court considers a petition for a recall of

sentence after final resolution of legal issues related to the original conviction and sentence. (*Anthony, supra*, at p. 1156; see *Scarborough, supra*, at p. 925.) That Dodson must wait until the resolution of his appeal before pursuing a section 1170.95 petition does not deprive him of a remedy.

### III. DISPOSITION

Dodson's conviction is affirmed, but the case is remanded for the trial court to exercise its discretion pursuant to Senate Bill 620 in deciding whether to strike or dismiss the firearm enhancements. Dodson may file a petition under section 1170.95, subdivision (a) in the sentencing court, seeking whatever relief may be available to him. We express no view as to his eligibility for Senate Bill 1437 relief, or, assuming eligibility, whether relief may ultimately be warranted.

STREETER, Acting P. J.

WE CONCUR:

TUCHER, J.  
BROWN, J.